

BRB No. 12-0084 BLA

BRENDA G. LESTER)
(Widow of BILLY L. LESTER))
)
 Claimant-Respondent)
)
 v.)
)
 JJ COAL COMPANY) DATE ISSUED: 09/19/2012
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Awarding Survivor's Benefits (2011-BLA-6230) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), P. L. No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

On August 19, 2011, claimant¹ filed a Motion for Automatic Award of Benefits, arguing that under amended Section 932(l), and given the filing date of her claim, she is entitled to benefits based on the award of benefits to her deceased husband.² In response, employer argued that the administrative law judge should deny claimant's request for an automatic award of benefits and grant its request for a hearing. Alternatively, employer argued that the case should be held in abeyance pending resolution of the constitutional challenges to the PPACA and the legal challenges to the amended Black Lung Benefits Act in federal court. The Director, Office of Workers' Compensation Programs (the Director), did not file a response to claimant's motion.

In his Order Awarding Survivor's Benefits, the administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of April 2011, the month in which the miner died.

¹ Claimant is the widow of the miner, who died on April 19, 2011. Director's Exhibit 7. She filed her survivor's claim on May 23, 2011. Director's Exhibit 4.

² The miner filed claims on November 19, 1999 and January 3, 2006. Director's Exhibits 1, 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on a lifetime claim. Director's Exhibits 2, 3.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.³ Both claimant and the Director respond, urging affirmance of the administrative law judge's award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional, as a violation of employer's due process rights and as a taking of private property, in violation of the Fifth Amendment to the United States Constitution.

Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments. We also reject employer's request that this claim be held in abeyance pending resolution of the legal challenges in federal court to the amendments to the Black Lung Benefits Act in the PPACA. *See Stacy*, 671 F.3d at 383-84 n.2, 25 BLR at 2-74 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order),

³ Employer argues that because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, adjudication of this claim should be held in abeyance pending resolution of the constitutionality of the PPACA, and the severability of non-health care provisions by the Court. Subsequent to the filing of employer's Brief in Support of Petition for Review, the Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, employer's argument that this claim should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

⁴ The record indicates that the miner was employed in the coal mining industry in Virginia. Director's Exhibit 1. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

appeal docketed, No. 11-1620 (4th Cir. June 13, 2011) (unpub.); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibits 2, 3, 4.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge